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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 ZANE M. FLOYD,

13
14 Plaintiff,

15 v.

16 CHARLES DANIELS, Director, Nevada
17 Department of Corrections, et al.,

18 Defendants.
19

Case No. 3:21-cv-00176-RFB-CLB

**RESPONSE TO NOTICE OF
SUPPLEMENTAL AUTHORITY**

(DEATH PENALTY CASE)

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR THE WEEK OF
JULY 26, 2021**

1 On May 14, 2021, defendants Nevada Department of Corrections (NDOC)
2 filed a notice of supplemental authority related to plaintiff Zane Floyd's pending
3 motions and NDOC's motion for protective order. ECF No. 67. Floyd hereby
4 responds to the State's notice.

5 NDOC cites to *United States Fish and Wildlife Service v. Sierra Club, Inc.*,
6 141 S. Ct. 777 (2021), but it does not explain how this case supports its position
7 with respect to the deliberative process privilege. ECF No. 67 at 2. *Fish and Wildlife*
8 *Service* does not address issues such as waiver of the privilege or apply the
9 substantial need exception that exists when a party seeks critical information that
10 can only be obtained from the opposing party.¹ To the contrary, *Fish and Wildlife*
11 *Service* concerns a litigant's Freedom of Information Act request for agency
12 documents. Floyd already acknowledged the deliberative process privilege applies
13 with the greatest force during public records act litigation for document discovery.
14 ECF No. 45 at 3.

15 Moreover, *Fish and Wildlife Service* supports Floyd's argument that he
16 should be permitted to obtain discovery of Dr. Azzam's opinion regarding the drugs
17 used in NDOC's execution protocol. The relevant statute and federal regulations
18 required the United States Fish and Wildlife Service to consult with the EPA and
19 render an opinion before the EPA proceeds with a proposed rule. *Fish and Wildlife*
20 *Service*, 141 S. Ct. at 783-84 (citing 16 U.S.C. § 1536(a)(2); 50 CFR §§ 402.01-402.17

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23 ¹ The decision only concerns the scope of the deliberative process privilege.
See id. at 786-89.

(2019)). As the dissent noted, “We all agree, I believe, that a Final Biological Opinion is not deliberative and that Exemption 5 of the Freedom of Information Act (FOIA) does not protect it from disclosure.” *Id.* at 789 (Breyer, J., dissenting, joined by Sotomayor, J.). Similarly, Dr. Azzam’s final opinion with respect to NDOC’s protocol (both the 2018 Dozier protocol and the current one) is not covered by the deliberative process privilege, which means it should be disclosed without engaging in a balancing test.

NDOC also cites *Pizzuto v. Tewalt*, __ F.3d __, 2021 WL 1904595 (9th Cir. May 12, 2021), which supports Floyd’s position with respect to ripeness of his method of execution challenge and is factually distinguishable as it concerns his procedural due process right to notice of NDOC’s execution protocol.

With respect to ripeness, NDOC asserts *Pizzuto* “may have some bearing on NDOC Defendants’ opposition to Floyd’s Motion for Temporary Restraining Order and Preliminary Injunction.” ECF No. 67 at 2. NDOC does not explain how *Pizzuto* applies to its ripeness arguments. *Pizzuto* rejects NDOC’s argument that Floyd’s challenge to the method of his execution is not ripe because he has other pending litigation challenging his death sentence. 2021 WL 1904595, at *3-4. As noted by the court, “we have not applied the ripeness rule advanced by the district court and have instead decided § 1983 claims similar to the ones here on the merits, even though plaintiffs had pending post-conviction proceedings.” *Id.* at *4. *Pizzuto* also rejects NDOC’s argument that Floyd’s claims are unripe because an execution warrant has not been issued. *Id.* at *4-5. To the contrary, when a plaintiff’s claims

1 concern access to information with respect to his upcoming execution, and where an
2 execution is effectuated in 30 days from issuance of the warrant, the claims are
3 undoubtedly ripe. *Id.* at *4-5 & n.7.

4 *Pizzuto* acknowledges “that the *absence* of an extent protocol is sometimes,
5 but not always helpful for determining ripeness.” 2021 WL 1904594 at *6 (emphasis
6 in original). The caveat acknowledged in *Pizzuto* is particularly relevant here. “We
7 are wary of assigning dispositive weight to the absence of an extant protocol,
8 because to do so would encourage states to withhold their protocols until the last
9 moment to minimize judicial scrutiny.” *Id.* Floyd has argued that NDOC’s failure to
10 disclose the drugs that it intends to use in his execution falls in this bad faith
11 category given NDOC’s argument that it is waiting for a signed execution warrant
12 before it will disclose the execution protocol.² This argument is also supported by
13 the Director’s testimony that he had concerns about releasing the execution protocol
14 early as it might encourage litigation with respect to the drugs being used in the
15 execution. ECF No. 49 at 76-77. The upshot of *Pizzuto* is that the path charted by
16 this Court to proceed in a careful fashion by permitting discovery of what is known
17 by NDOC now while respecting the Director’s need for more time to finalize the
18 protocol will separate the good from the bad motives while also allowing Floyd the
19 time needed to litigate his claims.

22 ² *E.g.*, ECF No. 25 at 13 (“NDOC is awaiting the issuance of a valid execution
23 warrant and order.”); 22 at 16 (“NDOC cannot proceed without the state court
issuing a valid execution warrant and order.”).

1 With respect to procedural due process, NDOC fails to mention the critical
2 facts that distinguish *Pizzuto* from Floyd’s case. In *Pizzuto*, the state disclosed its
3 execution protocol. 2021 WL 1904595 at *6. In such circumstances, the “injunctive
4 relief that plaintiffs seek – enjoinder of executions until IDOC issues a revised
5 protocol – is no longer necessary.” *Id.* *Pizzuto* also acknowledged “we have no basis
6 to think that IDOC would create a situation where there is no execution protocol in
7 place for these plaintiffs.” *Id.* As explained above, Floyd’s assertions of bad faith by
8 NDOC in failing to disclose its intentions with respect to his upcoming execution
9 implicate this caveat noted in *Pizzuto*.

10 *Pizzuto* is also distinguishable from Floyd’s case because it did not involve a
11 challenge to Idaho’s method of execution. To the contrary, the plaintiffs’ claims were
12 limited to obtaining information concerning the various options available to the
13 department of corrections to effectuate their executions. As the court noted, the
14 “four methods of execution have not changed significantly from the 2012 version of
15 the SOP.” *Id.* at *3 n.5. Of critical importance, the first drug in the protocol used to
16 induce anesthesia, a barbiturate, would either consist of sodium pentothal, the drug
17 used in the traditional lethal injection protocol uniformly used by the states from
18 the 1970s to 2008, ECF No. 2 at 7, 19 or pentobarbital, the barbiturate used by the
19 most active death penalty states, and the one advanced by Floyd as an alternative
20 to NDOC’s unknown and experimental protocol. ECF No. 2 at 50-53. That Idaho has
21 had substantially the same protocol since 2012, one that uses anesthetic drugs with
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1 a reliable track record, and has posted it to their website is a critical distinction
2 between the facts in *Pizzuto* and those before this Court in Floyd's case.

3 Floyd's complaint does not seek information solely for informative purposes.
4 Instead, his request for information is sought specifically for the purposes of
5 challenging the method of his execution. As noted above, the procedural due process
6 claim in *Pizzuto* was "mostly moot because plaintiffs are now on notice of the
7 revised SOP and can challenge its legality." 2021 WL 1904595, at *7. *Pizzuto's*
8 discussion of the residual information plaintiffs still sought after the disclosure of
9 the execution protocol must be understood in this specific context. It was precisely
10 this factual scenario that prompted the court to state, "Even if such a due process
11 right exists, we find it hard to imagine that it applies in this situation." *Id.* at *9.

12 *Pizzuto* and the cases cited from other circuits did not involve the extreme
13 situation present in Floyd's case where basic information regarding the drugs to be
14 used in the execution protocol are still not disclosed by NDOC only a short time
15 before the execution. To the contrary, even NDOC notes that the Ninth Circuit
16 acknowledged circumstances existed in Arizona that implicated the procedural due
17 process rights of condemned inmates. ECF No. 67 at 3. For example, in prior
18 executions in Arizona, there were "last-minute changes to the protocol, an
19 extraordinary degree of secrecy during and after the execution, and a record of
20 troubling executions." *Id.* at *9.³

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22 ³ Citing *First Amendment Coalition, Inc. v. Ryan*, 938 F.3d 1069, 1080 (9th
23 Cir. 2019); *Lopez v. Brewer*, 680 F.3d 1068, 1083 (9th Cir. 2012) (Berzon, J.,
concurring in part).

1 The historical record in Nevada reveals even more cause for concern than
2 those before the Ninth Circuit with respect to Arizona. NDOC has not conducted an
3 execution since 2006. NDOC engages in extraordinary secrecy with respect to its
4 execution protocol, only disclosing it after issuance of an execution warrant and
5 under compulsion by the court. After disclosure of a novel and experimental protocol
6 in 2017, NDOC made major errors with respect to the dosage of the drugs that it did
7 not address until it was pointed out by an expert for the condemned inmate. ECF
8 No. 4-3 at 3-15; 4-4 at 6 (concession by NDOC). And even then, the execution
9 protocol was not adopted by the Director until the week before the execution and
10 the protocol was ultimately found to violate the Eighth Amendment by the only
11 court that reviewed it. ECF No. 4-7 at 2-18.

12 Here, Floyd faces an imminent execution in the face of extraordinary secrecy
13 by NDOC. It appears the execution protocol may yet again involve experimental
14 drugs never used before in any prior execution, ECF No. 46-1, which will likely
15 again give rise to major problems with respect to dosage and drug interactions. And
16 the Director who is making the critical decisions with respect to the protocol is in
17 apparent disagreement with the Chief Medical Officer, ECF No. 41 at 2, the only
18 medical official he is statutorily required to consult, and he has expressed
19 confidence in NDOC's prior protocol even though he claims to know it was found to
20 be unconstitutional. ECF No. 49 at 57.

21 In summary, if ever a procedural due process right to know the details of an
22 execution protocol exist, it must surely exist in the circumstances of Floyd's case,
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1 and he is entitled to the discovery he seeks to support a method of execution
2 challenge that he intends to prosecute.

3 DATED this 17th day of May, 2021.

4 Respectfully submitted
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10 /s/ Brad D. Levenson
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CERTIFICATE OF SERVICE

In accordance with the LR IC 4-1(a) of the Local Rules of Practice, the undersigned hereby certifies that on this 17th day of May, 2021, a true and correct copy of the foregoing RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY, was filed electronically with the United States District Court.

Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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